IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISIDICTION

NOTICE OF MOTION NO.2055 OF 2005
IN
SUIT NO.2916 OF 1995

Rohit Vanmalidas Mehta .. Plaintiff

Vs.

Harshad Vanmalidas Mehta and Ors. .. Defendants

And

Manish Harshad Mehta .. Respondents

Mr.Chirag Balsara i/b Thakore Jariwala and Associates for the plaintiff

Ms.Aslesha Mireshi i/b A.R.Pande for defendant no.1

Mr.Uttam Hathi i/b K.Prabhu for the defendant no.2

Mr.J.R.Vakil for defendant no.3

Mr.Jayesh Vyas i/b Bilawala and Co. for defendant no.4

CORAM: S.U.KAMDAR, J
DATE : 30TH SEPTEMBER, 2005

ORAL JUDGMENT:

1. The present Notice of Motion is taken out for appointment of Court Receiver, High Court, Mumbai in respect of building known as 'Sonal' Building situated at 99, August Kranti Marg, Mumbai 400036 with all powers under Order XL of the Code of Civil Procedure. By prayer (b) of the motion

Receiver is also sought in respect of Flat No.3A situated on 3rd Floor, 'Sonal' Building, 99, August Kranti Marg, Mumbai 400 036 with all powers under Order XL Rule (1) of the Code of Civil Procedure, 1908 and with a direction to appoint any person as agent for use of the said premises on payment of monthly compensation and / or Royalty as may be fixed by the Court Receiver. Prayer is also sought in respect of Shop No.1 on Ground Floor with similar direction to take physical possession and appoint third party as agent in respect of said shop premises. In prayer (c) of the motion, relief is sought that defendant no.1 to deposit a sum of Rs.1.0 lac per month towards so called market rent in respect of occupation of flat no.3A on 3rd floor, Sonal Building, 99 August Kranti Marg, Mumbai 36. By prayer (d) (e) and (f) it is sought that action should be initiated under Order XXXIX Rule 2A for contempt against defendant no.1 for disobedience of the order passed by this court on 14.10.97 and / or the court should pass an order under Order 39 Rule 11 for striking of the defence of defendant no.1 in the present proceedings. Prayer (f) of the motion pertains to office

premises situated at 92, Chhotalal Bhavan, 418, Kalbadevi Road, Mumbai 2.

2. All the parties before me agree that in so far as prayer clause b (ii) and (f) are concerned, ad interim order passed by me on 18.8.05 in respect of the aforesaid two prayers be confirmed. However, the learned counsel for the plaintiff contends that he is seeking appointment of Court Receiver in respect of flat no.3A and also action under Order XXXIX Rule 2A and Order XXXIX Rule 11 of the Civil Procedure Code and is also pressing the claim of compensation of Rs.1. lac. Some of the facts of the present case are briefly enumerated as under.

3. The present suit is filed by the plaintiff claiming to be the co-owner in respect of property in possession with defendant no.1 Plaintiff and defendant no.1 to 4 are the sons of late Shri Vanmalidas J.Mehta and thus brothers. It is the case of the plaintiff that during the life time of the said late Shri Vanmalidas J. Mehta there were differences and disputes between the parties and in

the year 1998 the Mediator gave a decision which is dated 8.8.88 wherein the substantial assets were distributed among the parties under a Family Arrangement. The said decision of the Mediator is accepted by all the parties and thus, under the said decision all the properties are divided save and except the interest in the Sonal Building which is required to be held jointly. The said properties which are distributed among the parties are set out in Ex.D to the plaint. In so far as Sonal Building situated at 99, August Kranti Marg, Mumbai 36 excluding the premises situated on entire 1st Floor and the commercial godown premises situated on the rear road, Ground Floor the said building is required to be held jointly by the parties. These two premises of the said building i.e. 1st floor is awarded to the plaintiffs exclusively whereas the godown is exclusively allotted to defendant no.2 under the decision of the Mediator. Business of Jyoti Silk Mills is also jointly held and the shop premises standing in the name of sons situated at Shop No.N-13, Sahara Gate, P.O. Box 502, Umavadi, Surat, Gujarat is also held jointly by the families. In so far as Jyoti Silk

Mills is concerned there are no dispute in the present notice of motion since the same is held by partnership firm wherein plaintiff and defendant no. 1 to 4 are partners and the said premises are given on tenancy.

4. The dispute in the present proceedings centres around the building known as Sonal Building particularly the area which is jointly held by the parties i.e. excluding 1st Floor and the godown on the rear portion. Sometime in or about 7.6.92 the said Vanmalidas expired. Thus, the difference and dispute between the parties in the present suit is for distribution of the remaining estate which is jointly held and described in Ex.D. Each one of the parties have 1/5th share therein. It has been claimed that the said property should be partitioned and/or if not possible should be sold and the amount should be distributed to defendant no.1 to 4 in the ratio of 1/5th share each. The said suit has been filed in 1995. Sometime in or about 1995 Notice of Motion was taken out being 2201 of 1995 for interim reliefs interaia for appointment of Court Receiver and injunction in

respect of the said joint property. The said motion has been disposed of by an order dt.14.10.97. In so far as said Sonal Building is concerned, the learned single Judge has passed an order that the said properties are required to be protected and thus, injunction is issued restraining defendant no.1 from disposing of, encumbering, creating third party rights, parting with possession, accepting surrender of tenancy, transferring tenancy rights in respect thereof.

5. In para 6 of the said order it has been observed by the court that defendant no.1 is the Manager of property of Sonal Building and is managing the said property. Defendant no.1 is permitted to recover rent and pay taxes. It has been further recorded therein that incase tenants vacating any premises defendant no.1 to receive possession but not to create fresh tenancy or part with possession unless court order is obtained. The said para 5 and 6 of the order which is relevant for the purpose of present motion is reproduced hereunder:

"5. Considering rival claims of the parties and to protect the property pending disposal of the suit plaintiff and defendants are restrained from disposing of, encumbering, creating third party rights, parting with possession, accepting surrender of tenancy, transferring tenancy rights in respect of the properties described in Ex.D to the plaint.

6. Defendant no.1 who is the Manager of the property of Sonal Building to manage said property. Defendant no.2 to recover rent taxes etc. In case tenants vacating premises, defendant no.1 to receive possession but not to create fresh tenancy or part with possession unless court order is obtained."

6. It is the case of the plaintiffs that after passing of the order the suit was filed in Small Causes Court being RAE Suit No.721/1234 of 2001 against Late Suresh Shah and Suresh Gokul Shah who were in use occupation and possession of Flat No.3A on the 3rd Floor of the building whereby the decree for eviction was sought against the said tenant by defendant no.1. Area of the said flat is approx. 1675 sq.ft. In the said suit plaintiff and defendant no.2 and 3 made an unsuccessful attempt to be impleaded as party since their application was rejected.It is the case of the plaintiff that the said flat being flat no.3A on the 3rd floor of the building has been vacated by the said tenant who was in use occupation and possession thereof and the defendant no.1 has taken possession and inducted his son Manish Harshad Mehta. It is the case of the plaintiff that the induction of the son by defendant no.1 is in violation of an order dt.14.10.97 and thus, defendant no.1 has committed breach of the said order. It has been the case of the plaintiff that the said RAE Suit No.721/1734 of 2001 was settled by defendant no.1 with the said tenant by filing consent terms on 6.5.05. It is

the case of the plaintiff and defendant no.2 and 3 that violation of said consent terms also is contrary to the order dt.14.10.97. Thus, in the aforesaid circumstances, plaintiffs have sought receiver in respect of said flat 3A and further reliefs are sought that the receiver should take over possession of the said premises. On the aforesaid averments the plaintiffs have contended that there is breach of an order dt.14.10.97 and therefore action under Order XXXIX Rule 2A and Order XXXiX Rule 11 should be taken by this court. It has been contended that the son of defendant no.1 is power of attorney holder of defendant no.1 and it is the son who is managing the property and not defendant no.1. In the light of the aforesaid fact it has been contended that defendant no.1's son is in unlawful use, occupation and possession of the said premises from the date the premises is vacated by the tenant and thus said son of defendant no.1 should be directed to pay compensation for unlawful use thereof. @ Rs.1 lac per month till he hands over the possession. In respect of other prayers since ad interim order is confirmed by consent of the parties I am not going

into much details in respect thereof. The written statements are already been filed by the parties. Defendant no.2 and 3 has filed his affidavit in reply and they have supported the case of the plaintiff herein. There is also an affidavit filed by defendant no.1 dt.22.7.05. There is further affidavit filed by defendant no.1 dt.9.8.05. In these two affidavits defendant no.1 has contended that he has committed breach of the order dt.14.10.97 passed by learned single Judge of this court. It is the case of the defendant no.1 that plaintiffs are prosecuting the present motion because the plaintiff is already admittedly in possession of flat no.1A of the 1st floor and defendant no.2 is in possession of flat no.1B in the very same building. It is his case that in so far as defendant no.1 is concerned, they are not in possession of any part of the said building except flat 3A of which they have taken possession after tenant has vacated. It is his case that the said premises is occupied by defendant no.1 himself alongwith his son as family member and not by his son alone as claimed by the plaintiff. Receiver as well as defendant no.1 has already filed an

undertaking pursuant to my ad interim order that the son is not claiming any right in respect of the said premises and shall abide by the final orders passed by this court.

7. Defendant no.1 has also filed an undertaking interalia giving an undertaking that he will not create any third party right or part with possession of the said flat nor he will induct any third party in the said premises. The crux of the matter is whether defendant no.1 should be allowed to continue to occupy the said premises or not. The learned counsel for the plaintiffs has contended that defendant no.1 cannot be permitted because he has committed breach of the orders passed by learned single Judge dt.14.10.97 by entering into consent terms and entering into possession of the said premises and thus, plaintiffs is not entitled to remain in possession of the said premises. Alternatively, also the learned counsel for the plaintiffs have contended that in respect of HUF property or Joint Family property no single co-owner is entitled to be in possession of the said property. In support of the

aforesaid contention, he has relied upon the Judgment of the Apex Court in the case of Maharaj Jagat Singh v. Lt.Col.Sawai Bhawani Singh and others reported in AIR 1993 Supreme Court 1721 and contended that the aforesaid Judgment interalia holds that if a person has disposed of property in violation of injunction order then in that event the Court Receiver High Court, Mumbai should be appointed to protect and preserve the said properties. In the present case, the aforesaid Judgment has no relevance for the simple reason that the plaintiff has been able to establish that neither of the properties have been disposed of in violence of any injunction order. Thus the contention that obtaining possession of flat no. 3A is in breach of order dt.14.10.97 cannot be accepted because in para 6 of the said order plaintiff has been expressly permitted to take possession of the premises from the tenant but he is restrained from inducting any third party in possession of the said premises. It is the case of defendant no.1 that he is jointly in possession of flat 3A with his son. He further states that his son is only residing therein as a family member.

In light thereof it is not possible to accept the contention that there is any breach of the injunction order dt.14.10.97. The learned counsel for the plaintiff has thereafter relied upon the Judgment of the Lahore High Court reported in Basant Ram V.Dasondhi Mal and ors reported in AIR 1929 Lahore 497 and contended that in cases where a property is in the hands of one co-sharer and the share in the property is withheld from the other co-sharer, there is sufficient reason for appointing a receiver. The aforesaid Judgment does not lay down any such proposition of law. It is on the facts of that case that court came to the conclusion that other co-sharer has been deprived the fruit of the property. In the present case there is no such case made out. Merely because one flat is taken possession by defendant no.1 it cannot be said that the fruit of the property as a whole has been deprived to the defendant nos.2 and 3 and plaintiff herein. Secondly, though plaintiff and defendant no.2 are in occupation in their own right of their respective flats in the said building still it cannot be said that defendant no.1 who is a co-owner of the property is not

entitled to stay in any part of the said property as co-owner. In my opinion co-owner is entitled to be in use occupation and possession of each and every part of the property till the same is divided by mets and bounds and partitioned because the undivided interest of co-owners is in respect of entire property may be to the extent of his share. The learned counsel for plaintiff thereafter relied upon the Judgment of Lahore High Court in the case of Soham Ram Vs.Waryam and Ors reported in AIR 1929 Lahore 499 and Judgment of Patna High Court in the case of Kamal Chaudhary and another v.Rajendra Chaudhary and Ors. reported in AIR 1976 366Poreshnath Mookerjee and Ors. and Judgment of the ILR in the case of Poreshnath Mookerjee and Ors. V. Omerto Nauth Mitter reported in ILR 76 Calcutta 614. The aforesaid Judgments lays down the law that wherever there is a waste of the property then Court Receiver can be appointed thereof. This proposition of law is well settled and needs no authority. However, whether on the facts of the particular case whether case is made out for appointment of Receiver or not is an issue which is required to be determined on the facts of

each case. The only ground on which receiver is sought in the present case is that defendant no.1 has come in possession of flat no. 3A and he should not be allowed to use the same in exclusion of other parties as I have already held hereinabove that defendant no.1 is co-owner and as co-owner he is entitled to be in possession of part of the property itself indicates that there is no question of any waste or mismanagement of the said property in the present case which calls for an appointment of Court Receiver. In this case I am of the further opinion that the allegation that there is breach of order dt.14.10.97 and therefore action should be initiated in order XXXIX Rule 2A and Order XXXIX Rule 11 is baseless and without any merits.

8. I do not find any reason to initiate the action for contempt under Order XXXIX Rules 2A or an action for striking out defence under Order XXXIX Rule 11 of the CPC. In so far as claim for Rs.1.0 lac per month compensation is concerned, I am of the opinion that if plaintiff is occupying flat in exclusion of other co-owners then at the

time of valuation of the property and distributing the amount as per the share of each of the parties to the suit the plaintiff's share can be set off to the extent of user of the said property by him during the pendency of the present suit. Defendant no.1 has already given an undertaking and I am of the opinion that in the light of the undertaking given by defendant no.1 there is no need for appointment of Court Receiver as sought by plaintiff herein. I am of the further opinion that however a clarification is required to be issued that in an event if any other tenant vacates the premises in the said Sonal Building then in that event defendant no.1 shall give notice to the plaintiff and defendant no.2 and 3 who shall then be entitled to apply to this court for being put in possession of the said other premises which is fallen vacant herein after since the defendant no.1 is in possession of one of the flat exclusively. In the aforesaid circumstances, I am of the opinion that save and except the confirmation of ad-interim order dt.18.8.05 passed by me and clarification set out hereinabove no further orders are required to be passed in the present Notice of Motion. I thus,

dispose of the motion by confirming an ad-interim order in the present Notice of Motion and with further clarification as issued hereinabove in respect of the said property. Motion disposed of accordingly. However, there shall be no order as to costs.